No. 17-204

In the Supreme Court of the United States

IN RE APPLE IPHONE ANTITRUST LITIGATION,

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Respondents' case is barred by this Court's *Illinois Brick* doctrine because the only damages theory alleged is a pass-through overcharge theory. The causal chain alleged is that (a) Apple's monopoly leads to (b) an excessive 30% commission charged to app developers that leads to (c) developers setting higher apps prices that lead to (d) consumer injury when iPhone users buy those apps at whatever prices the developers set. Those allegations make any alleged consumer injury turn on what (if anything) developers did with Apple's commission when setting apps prices—decisions that precede apps sales to consumers. As the United States explains, "Respondents are injured by Apple's allegedly exorbitant commission only if, and to the extent that, developers seek to recover some or all of that commission by increasing the prices of their apps." U.S. Br. 7.

Respondents have no answer to this key point. Neither Respondents nor their *amici* address the extensive discussion of the pass-through issues in Apple's opening brief and the United States' brief. Pet Br. 24-30; U.S. Br. 19-24. They do not articulate any damages or injury theory that would *not* depend on the premise that developers have passed through Apple's commission in their pricing decisions. Instead, Respondents admit that developers "select a retail price that Apple will charge owners for the developers' apps," Resp. Br. 7, and that they therefore seek damages on the theory that developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10; *see also* JA143 (similar admission in

district court). This is a textbook theory of indirect, pass-through harm, squarely barred by *Illinois Brick*.

Respondents answer by first trying to create factual uncertainty over the issue presented, and then arguing that plaintiffs with "direct" interactions with the defendant should be entitled to seek pass-through damages, that duplicative litigation may not result in duplicative damage claims, and that an *Illinois Brick* exception is warranted for electronic commerce. The Court should reject these arguments.

First, the only relevant facts were either alleged in the complaint or conceded in argument, including the brief in opposition. Those facts bear on the key question of whether the injury claimed by Respondents is direct or indirect—principally the four steps in the causal chain described above.

Respondents' efforts to manufacture factual uncertainty relate to issues peripheral to the *Illinois Brick* rule. For example, Respondents argue that the relevant market is the "retail aftermarket for iPhone apps," not the "distribution" market described countless times below. But even if those were different markets (and they are not), the *injury theory* is the same, and that is what gives rise to the *Illinois Brick* problem. Similarly, the fact that Apple requires non-zero prices to end in $.99, which was raised for the first time in this Court, only makes the pass-through problems presented by Respondents' theory more complex. While Apple responds below to the various "factual" arguments Respondents raise, all that matters in a case about an allegedly monopolistic commission that impacts developer pricing decisions is that app developers are temporally, literally, and economically the ones directly injured by Apple's alleged misconduct. Developers alone are entitled to

bring damages claims relating to that commission under this Court's long-standing precedent.

Second, there is no basis for Respondents' argument that pass-through damages claims are permitted whenever there is direct interaction between the plaintiff and alleged antitrust violator.

This argument openly exalts form over substance by turning entirely on the formal identification of a "direct purchaser" and *prohibiting* any "further inquiry into the specifics of a case," even into the nature of the damages theory. Resp. Br. 23-24. That is not true to *Illinois Brick*, as Respondents claim. It alters the doctrine beyond recognition. The *Illinois Brick* rule has always been grounded in this Court's unwillingness to let antitrust litigation become a "massive effort[] to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977). Pass-through damages theories are prohibited in whatever form they take—even where, as in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (1990), there is a credible argument that the overcharge necessarily would be passed on entirely. This explains why Respondents cannot cite even one case holding that "those who purchase a product or service directly from an antitrust violator" may seek pass-through damages. The amicus brief from a group of states urging this Court to overrule *Illinois Brick* is at least candid about what Respondents are truly asking for, because there is no merit to the idea that, under this Court's precedents, any transactional

relationship with the alleged antitrust violator is a license to seek pass-through damages.[1]

Third, Respondents attempt to address the inevitable duplicative recovery concerns posed by their complaint by suggesting that app developers would seek non-overlapping damages based on a "monopsony" theory. There is no basis in the Court's doctrine for this kind of speculation. The potential for multiple, competing overcharge claims is what matters, and that is undeniable here since developers would be the parties first and directly injured by any allegedly excessive commission. This Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), gives developers a claim for 100% of any overcharge. No rational developer would forego a claim that this Court's precedents

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[1] This case does not present the occasion to reconsider *Illinois Brick*, as certain State Attorneys General propose—and notably, as the American Antitrust Institute ("AAI") opposes. *See* AAI Br. 28-29. Any meaningful change is best left to Congress, which has not disturbed the relevant language of Section 4 despite numerous proposals to overrule *Illinois Brick* and multiple other amendments to the Clayton Act. *See* Washington Legal Found. Br. 9-14; *Illinois Brick*, 431 U.S. at 736-37 (declining to reconsider *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), since "considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"); *Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998). Furthermore, every serious reform proposal on this subject goes far beyond overruling *Illinois Brick*, since that step alone would guarantee duplicative recoveries. *See* Antitrust Modernization Comm'n, *Report and Recommendations* 267 (Apr. 2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf (recommending, *inter alia*, legislation capping total damages at "the overcharges (trebled) incurred by direct purchasers").

squarely allow, let alone for a monopsony theory that does not even apply because Apple does not buy apps. Respondents also admit that "lost profits" could be "negative or zero" even in the case of an overcharge, Resp. Br. 3, which is another reason why developers would never pursue this strategy.

Fourth, Respondents ask this Court to exempt electronic commerce from the scope of *Illinois Brick*. But there is no basis for an industry-specific carve-out to *Illinois Brick*, let alone one disadvantaging one of the most important sectors of our economy. This Court has refused to go down such a path before, and none of Respondents' proposals present any reason to change course. Appropriately focused on whether there is a pass-through damages theory, the *Illinois Brick* rule can distinguish between consumers suing for a direct injury and those, such as Respondents, seeking indirect damages grounded in what happened to someone else first.

A straightforward application of *Illinois Brick* bars these pass-through damages claims.

ARGUMENT

I. RESPONDENTS ALLEGE A PASS-THROUGH THEORY OF INJURY THAT IS BARRED BY *ILLINOIS BRICK*

Respondents and their *amici* write at length about Apple's close interactions with consumers and its control of the App Store, but ignore the question of how consumers could be injured by the policies Respondents challenge as anticompetitive. That is because there is no way to determine consumer damages based on a causal chain of: *monopoly → Apple's excessive commission → app developers' higher apps prices → consumer injury* without litigating over

whether, and how, the commission first affected developer pricing decisions. Neither Respondents nor anyone supporting them have proposed a non-pass-through damages theory.[2] This case therefore remains a textbook case of indirect, pass-through injury—and an extraordinarily complex one because pass-through amounts would vary app-by-app.[3] Pet. Br. 27-29.

Respondents instead try to create uncertainty about the facts. But the district court was careful not to dismiss this case until Respondents clarified their

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[2] Respondents say that consumers would seek "the difference between the price the device owners paid Apple for an app they bought from it in the monopolized retail market and the price of the same or an equivalent app in a hypothetical competitive market." Resp. Br. 39. But that is just a long way of saying "overcharge," which is always a supracompetitive price less the competitive price. What is missing is any explanation for how Respondents would calculate the competitive price for an app without accounting for how the developer was influenced by Apple's commission.

[3] Apple and others disagree that "advancements" in econometric methods mitigate this difficulty. *See* Chamber of Commerce Br. 15-19. The primary point made in the authorities Respondents cite is simply that computers are more powerful today, which (sometimes) allows economists to estimate elasticities from large datasets. No one would ever call that easy, however. The fundamental indeterminateness of incidence analysis remains. *See, e.g.*, Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 Loy. Consumer L. Rev. 1, 10 n.39 (2004) ("[E]ven the most forceful opponents of the *Illinois Brick* holding fail to come to grips with a basic tenet of that ruling: proof of passing-on requires a number of assumptions which cannot be easily or accurately translated from the economist's hypothetical model to the real economic world."). And no advancements in econometrics can address the unique problem in this case: needing to conduct hundreds of thousands or more individual pass-through analyses.

allegations. The record is clear on the four dispositive allegations:

The alleged monopoly: The complaint alleges that Apple "cornered 100% of the worldwide distribution market for iPhone applications." Pet. App. 41a (¶ 3).

The commission: Apple required app developers to pay Apple a 30% commission on paid apps sales—supposedly a higher commission rate than would be sustainable "[i]n a truly competitive iPhone apps distribution environment." *Id.* at 55a (¶ 48).

Developer app pricing decisions: Developers then set their apps prices knowing what Apple charged for distribution. *Id.* at 52a (¶ 40).

Consumer injury: Higher apps prices allegedly resulted, because—as Respondents told both courts below—developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10; JA143.

Respondents' efforts to muddy the waters change nothing.

The "retail aftermarket" and the distribution market are one and the same. Respondents claim that Apple mischaracterizes Respondents' complaint as complaining of a monopoly over an apps *distribution* market when the actual market is a "retail aftermarket for [iPhone] apps." Resp. Br. 24. This is an empty semantic dispute. *Illinois Brick* turns on the alleged causal chain of consumer injury, not on market definition.

Nevertheless, Respondents' own complaint and briefing demonstrate that "distribution monopoly" and "retail aftermarket monopoly" are, in this setting, just two different ways of saying the same thing. Indeed, Respondents themselves use these phrases interchangeably—characterizing the alleged problem

as "a monopoly on distribution services," *id.* at 14, continuously, and not just in the complaint. Their Ninth Circuit brief alone refers to a "worldwide apps distribution monopoly" twice, Pepper CA9 Br. 21, 31, and argues that Apple's "closed distribution system . . . protect[s] itself against any competition it might face in the distribution of iPhone apps." *Id.* at 5. Respondents' *amici* also routinely describe this case as one involving "a distribution monopolist." AAI Br. 19; *see also* Antitrust Scholars Br. 19 ("Apple sells distribution services upstream to developers").

Respondents' reference to an "aftermarket" is an effort to plead this case within the aftermarket doctrine of *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), so as to limit the market to one for distribution of iPhone apps rather than all smartphone apps. *See* Resp. Br. 4 n.1; *infra* n.11. The alleged Apple monopoly at issue is still over the distribution of iPhone apps to iPhone users. The "retail aftermarket" now advanced by Respondents captures the same concept in another way: that distribution of apps to iPhone users takes place at the "retail" level of the market. It remains the same distribution market.

Apple does not buy and resell apps. Respondents suggest for the first time that Apple "has adopted the role of a retailer functionally buying from developers as wholesalers and selling to iPhone owners as consumers." Resp. Br. 43. But their complaint does not allege that. And Respondents have repeatedly acknowledged that only consumers buy apps; Apple does not. Pepper CA9 Br. 9. The Apple developer agreements cited by Respondents confirm this: developers "do[] not give Apple *any ownership interest* in [their] [a]pplications." Apple,

iPhone Developer Program License Agreement § 2.5 (Jan. 22, 2010 version) (emphasis added).[4] So Apple is fundamentally unlike a traditional retail store.

Respondents' damages theory is based "solely" on Apple's 30% commission. Respondents' theory of injury has always been rooted in the allegation that the "closed" ecosystem of the App Store "has enabled Apple to charge and collect a supracompetitive 30% fee." Pet. App. 42a (¶ 4). That 30% fee is mentioned seventeen times in the complaint, fifty-six times in Respondents' Ninth Circuit brief, and twenty-three times in the brief in opposition.

Respondents have no other damages theory. After the petition for certiorari explained the role of the 30% commission in Respondents' injury theory, Pet. 8-9, the brief in opposition conceded the point—affirming that "Respondents seek damages based solely on the 30% markup." BIO 5 (citing Pet. App. 51a-52a (¶¶ 38-41)). Respondents even dismissed the prospect of duplicative developer litigation on the ground that "there is only *one 30% markup*" and developer claims would necessarily be for "a piece of the same 30% pie." *Id.* at 12.

Developers set apps prices. Since the inception of this case, Respondents have sought to avoid the central and indisputable fact that developers set apps prices. The argument below was that Apple adds 30% to the developer's price, but that argument was not sustainable. *See* Pet. Br. 12-15. Respondents eventually admitted that it is the developer who sets the final price of an app, that Apple's 30% commission

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[4] *Available at* https://www.eff.org/files/20100127_iphone_dev_agr.pdf (last visited Oct. 19, 2018).

is collected from the developer-set price, and therefore the damages theory is that "[t]he developer is going to increase its price to cover Apple's . . . demanded profit." JA143. Respondents likewise admitted to the Ninth Circuit that developers "will mark-up the price to cover Apple's 30%." Pepper CA9 Br. 34 n.10. This case therefore comes to this Court with both courts below having found that developers set the prices that consumers pay, Pet. App. 21a, 36a-37a, and Respondents admitting it yet again. Resp. Br. 7 ("Apple permits developers to select a retail price that Apple will charge . . . .").

Respondents now claim that the developer's pricing freedom is restricted because Apple requires non-zero prices to end in $.99, and Apple retains the theoretical ability to change its policies and set prices. But neither assertion disproves that the developers set their apps prices. If anything, the $.99 pricing convention adds further complexity to the pass-through inquiry. It means that on top of everything else affecting how developers might or might not pass-through Apple's commission, the developer also must consider the need to hit a $.99 price point.[5] The salient point is that consumers can suffer injury from Apple's commission only if that commission causes

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[5] The $.99 rule does not "effectively rul[e] out 99% of possible prices." Resp. Br. 33. In fact, prices for most goods "cluster" around certain end-points, the most popular of which is $.99. For the developer who finds the jump between $0.99 and $1.99 too much, the alternatives are to shift its monetization strategy toward more in-app purchases, advertising, subscription, various combinations of those approaches, and so on. *See, e.g.*, Ailie K. Y. Tang, *Mobile App Monetization: App Business Models in the Digital Era*, 7 Int'l J. of Innovation, Mgmt. & Tech. 224 (2016).

developers to change the price (still ending in $.99 for paid apps) they would have chosen if Apple's commission were lower.

Apple is a sales and distribution agent for developers. Respondents argue that Apple cannot be an "agent" of the developers because agency law is about "control" and Apple has too much "control" over the App Store. That syllogism grossly oversimplifies the law of agency and misses the point that matters.

Apple is not advancing a formalistic "agency defense." In fact, the concept of agency did not arise in this case until after the Ninth Circuit's decision, when Apple needed to explain how the Ninth Circuit's "distributor function" rule would harm electronic commerce, much of which is organized under the agency sales model. Pet. 29-31. Apple's core argument has always been that any injury to consumers necessarily depends on developer pass-through decisions, since Apple does not set apps prices. It happens to be a defining feature of agency selling arrangements that the principal, not the agent, sets prices. But the correct application of *Illinois Brick* here does not depend on any fine points of agency law.

That said, Respondents now affirmatively rely on the express terms of the iPhone Developer Program License Agreement. As Respondents note, that Agreement confirms that "Apple acts as an agent for App Providers in providing the App Store *and is not a party to the sales contract or user agreement between [the user] and the App Provider.*" *See* Resp. Br. 5-6 (emphasis added) (citation omitted). Thus, Respondents concede that the direct sale is actually between developers and consumers, facilitated by Apple as an agent and conduit.

II. *ILLINOIS BRICK* DOES NOT ALLOW PASS-THROUGH THEORIES SIMPLY BECAUSE THE PARTIES INTERACT DIRECTLY

Respondents would have this Court hold that, in all cases, any party "who purchase[s] a product or a service directly from an antitrust violator can sue that violator for damages." Resp. Br. 23. They claim that prohibiting damages claims by directly interacting plaintiffs would create "a new exception to *Illinois Brick*." *Id.* at 38. This is incorrect. *Illinois Brick* prohibits all pass-through damages claims. Honoring that principle here does not create an *Illinois Brick* exception; it falls squarely within the rule.

The *Illinois Brick* line of cases has always focused on the practical and jurisprudential problems posed by pass-through damages claims, including the potential for duplicative damages. *Hanover Shoe* held—without using the term "direct purchaser"—that antitrust defendants cannot assert, as a defense, that the plaintiff passed on any harm to its own customers. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491-93 (1968). *Illinois Brick* held that plaintiffs cannot claim damages premised on the theory that an overcharge was passed through to them. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 737-38 (1977). And *UtiliCorp* held that this rule remains firm even when there is reason to doubt that the direct purchaser absorbed any of the overcharge. *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199, 217 (1990).

The terms "direct purchaser" and "indirect purchaser" reflect this, as they were coined in *Illinois Brick* to contrast the first to bear an overcharge from others indirectly injured. Masonry contractors who directly purchased price-fixed concrete blocks were

"direct purchasers" while governmental entities who purchased entire buildings (incorporating concrete blocks) were "indirect purchasers." In that context, the Court was concerned that "[t]he only way in which the antitrust violation alleged could have injured [the "indirect purchasers"] is if all or part of the overcharge was passed on by the masonry and general contractors." *Illinois Brick*, 431 U.S. at 727. "Directness" was thus in relation to the alleged overcharge, and "direct purchaser" was "shorthand for a party that bears an antitrust violator's unlawful overcharge in the first instance." U.S. Br. 8-9. The plaintiff's proximity to the overcharge is the analytical foundation of the "bright line" rule that "the overcharged direct purchaser . . . is the party 'injured in his business or property' within the meaning of" the Clayton Act. "[A]n indirect purchaser," by contrast, "should not be allowed to use a pass-on theory to recover damages from a defendant." 431 U.S. at 729.

Here, app developers are "direct purchasers" in the exact sense in which *Illinois Brick* used that term. They are analogous to the masonry contractors, who suffered "an antitrust violator's unlawful overcharge in the first instance," U.S. Br. 9, and whose damages claims would not implicate pass-through. Respondents, on the other hand, are claiming a derivative, indirect injury, like the government plaintiffs in *Illinois Brick*, and thus are "indirect purchasers" in the *Illinois Brick* taxonomy.

Respondents hijack the "direct purchaser" shorthand to contend that *Illinois Brick* begins and ends with whether the plaintiff deals, transacts, or buys "directly" from the alleged monopolist. But that takes the overcharge out of "overcharged direct

purchaser," making the term empty and unhelpful. Imagine how many different ways the words "sell" and "purchase" might be used. Apple "sells" iPhones, which it makes, but also "sells" apps that are made and priced by others—and result in end-user license agreements between developers and consumers. Respondents would say consumers are "purchasers" in both cases, dealing directly with Apple. But the two scenarios are fundamentally different from a Section 4 *injury* perspective. Apple is a price-setting seller of iPhones, but not of third-party apps. A claim about overpriced iPhones purchased from Apple would be a direct injury claim, but the apps claims here are not. A legal rule that ignores these important differences—indeed, that mandates "[n]o further inquiry into the specifics," Resp. Br. 24—would miss what is most important to the Section 4 question. So would the Ninth Circuit's "distributor function" rule, which arrives at an equally arbitrary outcome in a different, yet still formalistic way. Pet. Br. 41-46.

Most telling is Respondents' failure to cite any authority in support of the proposition that transactional proximity is the key to *Illinois Brick* or justifies pass-through damages. Respondents and their *amici* just assert that *Illinois Brick* is satisfied by any relationship that can be characterized as a direct purchase, without citing anything from this Court or any other to support the proposition that pass-through damages claims are then appropriate. They are never appropriate, even when an *Illinois Brick* exception applies. Pet. Br. 29 n.12.

Respondents' proximate cause argument, *see* Resp. Br. 25, cuts the wrong way. This Court's judgment to prohibit pass-through theories was

based, in part, on the long-held view that standing under Section 4 of the Clayton Act is limited by notions of proximate cause, and *Hanover Shoe's* holding that pass-through damages arguments violate the "general tendency of the law, in regard to damages at least, . . . not to go beyond the first step." 392 U.S. at 490 n.8 (citation omitted). The "first step" that *Hanover Shoe* referenced is between the injurious conduct alleged and the overcharge, which here is the commission. Respondents are not at that first step; developers are. Respondents seek damages based on a secondary effect of the overcharge on apps prices, which is an indirect injury theory.

Respondents also misrepresent the *eBooks* case as an Apple "concession" that consumers could always advance damages claims against Apple in a similar market structure. *eBooks* involved allegations of a vertical conspiracy with publishers to raise the price of e-books. There was no independent price-setter between the conspiracy and consumers. *Illinois Brick* therefore did not apply.[6] This monopolization case, which is based on injury flowing through app developers who no one claims are conspirators, is different.

Respondents accuse Apple of inviting "a free-ranging inquiry" about "'pass-through and duplicative recovery'" that would somehow allow defendants to hide behind complicated transaction structures. Resp. Br. 28-29 (citation omitted). This is incorrect. Whether the plaintiff is seeking pass-through

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[6] The lower courts have held that, in vertical conspiracy cases, a plaintiff may sue any co-conspirator for damages when the price that they have paid directly is the one that was unlawfully fixed.

overcharges has always been the central concern of the *Illinois Brick* line of cases. And here, focusing on the injury theory and the potential for duplicative overcharge litigation is more accurate than Respondents' focus on form—or the Ninth Circuit's focus on "functions." *See* 2A Phillip E. Areeda et al., *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 346j (3d ed. 2007) ("When distribution chains are complex, making it difficult to identify who dealt directly and who indirectly, it is less important that the court formalistically identify a direct purchaser and more important that it adhere to the principles that the *Illinois Brick* rule reflects.").

Respondents' formalism is self-defeating in any event. As noted, Apple is formally an agent that facilitates a direct sale or licensing relationship between the developer and the consumer. *See* Resp. Br. 5-6 & n.5 (quoting the relevant agreement). It is not a party to any such agreement except in the rare case in which it is the app developer. *Id.* These "direct purchases" are thus formally agent-facilitated licensing transactions between app developers and consumers.[7] Respondents' claims fail on that ground too.

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[7] Respondents incorrectly contend that the Areeda antitrust treatise takes the position that "for purposes of the *Illinois Brick* rule, the agent acts as a purchaser-reseller even though for purposes of contract and property law it may act as a broker[.]" Resp. Br. 35. The cited section of the treatise is not about *Illinois Brick*. Instead, it makes an unrelated point about when consumer standing is available to "brokers and others who stand in a buyer-like position but who may not actually take title to the goods that are sold." Areeda, *supra* ¶ 345.

III. THE POTENTIAL FOR DUPLICATIVE RECOVERY BY APP DEVELOPERS IS INDISPUTABLE

Respondents do not defend the Ninth Circuit's error in concluding that the prospect of duplicative claims by developers "makes no difference to [the] analysis" in this case. Pet. App. 20a. Rather, they contend that every developer plaintiff would abandon the overcharge claim Respondents found optimal and advance "monopsony" claims seeking lost-profits damages instead. This approach would introduce into the *Illinois Brick* framework an unwarranted and unmanageable case-by-case analysis of what direct-purchaser claims might look like. It is also an implausible account of the claims developers could assert.

First, this argument admits that there may be duplicative litigation by developers, but says no one should care because developers could conceivably advance different legal theories and seek different measures of damages. There is no room in this Court's *Illinois Brick* doctrine for such an argument. *Illinois Brick* and *UtiliCorp* refused "to 'open the door to duplicative recoveries' under § 4." *Illinois Brick* 431 U.S. at 731 (citation omitted); *UtiliCorp*, 497 U.S. at 212-13.

Second, a "monopsony" developer claim makes no sense because Apple does not buy apps and therefore cannot be a monopsonist. *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007) ("[A] monopsony is to the buy side of the market what a monopoly is to the sell side . . . ."). Respondents previously conceded that Apple does not "buy[] apps from the developers and resell[] the apps to consumers." Pepper CA9 Br. 9; *see also* ACT | The

App Association ("ACT") Br. 18 ("[Apple] is not a reseller of apps because it is not the owner of any third-party apps it hosts on its App Store.").

Third, Respondents previously admitted that developers would frame their damages in terms of the allegedly anticompetitive overcharge—seeking a piece of the "same 30% pie." BIO 12. No rational developer would opt for the more difficult and less valuable lost profits claim instead. That would entail foregoing the benefits of the *Hanover Shoe* rule, which "concentrate[s] the full recovery for the overcharge" in the direct purchaser's hands. *Illinois Brick*, 431 U.S. at 734-35. Respondents themselves argue the lost profits could be "zero, or negative," even if there is a supracompetitive commission. Resp. Br. 41.[8]

Respondents' duplicative litigation argument is thus legally and factually baseless.

IV. THERE ARE NO "POLICY REASONS" FOR AN *ILLINOIS BRICK* EXCEPTION FOR ELECTRONIC COMMERCE

Finally, Respondents ask the Court to create a categorical exception to *Illinois Brick* "that would hold online retailers to account if the retailers, themselves, engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers." Resp. Br. 48. There is no legal basis

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[8] Respondents also argue that "any action brought by the developers would require damages calculations at least as complex as those implicated in this case." Resp. Br. 45. That is not the case if the developers sought overcharges as they rationally would do, since by construction indirect purchasers must calculate the same initial overcharge as direct plaintiffs *and then the pass-through*. Indirect injury claims are always more complex.

for considering this request, let alone for believing that, once created, the electronic commerce exception would not be abused.

As a matter of law, Respondents' argument is foreclosed by *UtiliCorp*, where the Court held it would be "an unwarranted and counterproductive exercise to litigate a series of exceptions" to *Illinois Brick*. 497 U.S. at 217. Changing that principle would have far-reaching consequences, as Respondents are not the only ones who could muster arguments in favor of industry-specific *Illinois Brick* exceptions.

In this case, there is no basis for the suggestion that where consumers are interacting with a platform sponsor (Apple) on one side of the platform, they have *Illinois Brick* standing with respect to everything that happens on the platform. That will depend on the conduct at issue and how it affects consumers. There will be occasions where consumers are the first to bear an alleged overcharge and therefore have standing to seek damages. But that does not mean that consumers without a legitimate claim of direct injury should be allowed to seek damages too. The rationales underlying this Court's *Illinois Brick* jurisprudence permit a reasoned distinction between such cases, and do not justify a blanket exception for online commerce.

Nor is there any basis for Respondents' argument that because developers either cannot or will not assert antitrust claims against Apple, consumers should be allowed to. The argument "that direct purchasers sometimes may refrain from bringing a treble-damages suit for fear of disrupting relations with their suppliers" was rejected in *Illinois Brick*, 431 U.S. at 746, and then again in *UtiliCorp*, 497 U.S. at 217. And since then, no court has ever found

justification for a case-by-case exception to *Illinois Brick* that turns on a comparative analysis of who is most likely to sue.

Antitrust defendants should not need to apologize for the fact that those directly affected by their conduct have not sued. In this case it is true that Apple's app distribution policies have never been challenged by any developer, large or small, nor by any federal or state antitrust authority. But that is most likely explained by the fact that developers understand and have shared in the explosion of output, procompetitive benefits, and efficiencies of the iOS ecosystem, which last year alone generated $26.5 billion for iOS developers. *See* ACT Br. 9-10; Computer & Communications Industry Ass'n Br. 20-22. The absence of developer litigation, in other words, is healthy and normal, not proof that those who own the cause of action are afraid to litigate.

In all events, on the facts of this case, app developers—which include the likes of Google, The New York Times, Electronic Arts, and so on—are more "efficient antitrust enforcers" than consumer class action lawyers. This is particularly true if efficiency is defined to include a willingness to distinguish between procompetitive and anticompetitive behavior. It is the developers that contract with Apple to distribute their apps through the App Store and who live with Apple's policies day-to-day. *Are those policies output-enhancing?* No one will know more and care more than developers. *Are Apple's commissions excessive?* No one will know better than developers that the commissions are fundamentally the same as charged for other

platforms.[9] Developers are also the more efficient enforcers because their financial incentives to sue are appropriately moderated by the fact that they would internalize any adverse effects of condemning beneficial practices by Apple.

Respondents' claim to be the more efficient enforcers rests mostly on class action lawyers' willingness to sue regardless of any other considerations. That is not efficient; it is opportunistic. And nowhere is this opportunism more evident than in Respondents' elaborate attempts to belittle and even disenfranchise app developers. *See* Resp. Br. 40 n.17 (advancing a merits argument against developer claims). None of this is allowed by *Illinois Brick*. There is no "next best plaintiff" theory that permits indirect purchasers to secure their own standing by undermining the claims of those who first bear an alleged overcharge.

Respondents' disregard for precedent reaches its apex with their final argument, which consists of a series of merits attacks on Apple's policies to support

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[9] This is public knowledge, since every platform publishes its commission structure. Microsoft's Windows Phone Store, Google Play, Facebook, and Amazon's mobile app platform all charge 30% commissions on paid apps. *See* Microsoft, App Developer Agreement (effective date May 23, 2018), https://docs.microsoft.com/en-us/legal/windows/agreements/app-developer-agreement; Google, Play Console Help: Transaction Fees, https://support.google.com/googleplay/android-developer/answer/112622?hl=en (last visited Oct. 19, 2018); Amazon, Amazon Developer Services Agreement, https://developer.amazon.com/support/legal/da (last updated Sept. 25, 2018); Facebook, Payment Terms, https://developers.facebook.com/policy/payments_terms/ (last updated Dec. 29, 2016).

the idea that a new electronic commerce exception "likely would not" expose other marketplaces "to the type of action respondents have brought here." *Id.* at 49. There is no credible argument that *Illinois Brick* exceptions should be doled out by courts on yet another case-by-case analysis, this one about how future plaintiffs would or would not take advantage of the new exception. The potential for abuse is plain enough here, where Respondents attack a historically innovative and successful app distribution system with an argument that Apple was a "monopolist" on the day of its entry.[10] Indeed, it is telling that none of Respondents' *amici* embrace their merits theory in any respect.[11] It is therefore not credible for Respondents to claim that the new, case-by-case *Illinois Brick* exception they advance would not be abused.

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[10] Respondents' case is ostensibly based on this Court's *Kodak* decision, which recognized that a single-brand "aftermarket" (e.g., Kodak copier parts, or iPhone apps) could be a relevant antitrust market in certain circumstances, but not in others. The key issue is whether consumers were exploited by restrictive aftermarket practices that they first learned of *after* they were "locked-in" to the defendant's product. 504 U.S. at 469-477. On the other hand, the entire Court agreed that there is no relevant aftermarket when the defendants restrictive practices were "generally known" in the marketplace before consumers were locked-in. 504 U.S. at 477 n.24 (majority opinion), *id.* at 492 (Scalia, J., dissenting). Here, there was never an "open" iOS app distribution system. It was "closed" from inception. So *Kodak* defeats rather than supports Respondents' claim.

[11] The Antitrust Scholars contradict it by saying that the "mobile app store market appears to be a duopoly occupied by Apple and Google," and that the smartphone market is "dominated" by *six* manufacturers. Antitrust Scholars Br. 13-14.

There is no rationale for this Court to create an electronic commerce exception to *Illinois Brick*.

CONCLUSION

Apple respectfully asks that the judgment of the court of appeals be reversed.

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October 29, 2018